

# Exploring the Viability and Efficacy of Fresh Slate Approach in India's Evolving Insolvency Framework\*

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## Abstract

A nation's economy remains healthy and progressive because of the proper functioning of commercial and other business arrangements, transactions, and settlements. However, suppose such agreements are not concluded in the desired manner and result in failure. In that case, efforts are required to keep the corporation going with novel arrangements of liability and employment and re-negotiation between financiers. Nevertheless, the drowning company can resort to liquidation if survival becomes unworkable. The legislature and the judiciary have endeavoured to comply with and meet the objectives of the IBC. Adopting the new slate doctrine in the legal framework is one such step towards reaching the goal of the code. The code has facilitated the applicant's resolution by various means and balanced the corporate debtor's concern. The researcher has analytically analyzed this principle owing to its significance. In the initial phase, the research shed light on the doctrine of a fresh slate while referring to relevant legislative provisions and other jurisdictions. After that, the researcher explores the judicial wing's recognition and development of the doctrine. Principally, the researcher examines the status and management of disputed claims. In the latter segment, the researcher indicates the limitations and practical issues attached to the doctrine. Lastly, the researcher would make some suggestions that can be adopted and may aid in strengthening the Indian insolvency regime.

**Keywords:** IBC; Fresh Slate Approach; Judicial Pronouncements; Limitations

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## Mengeksplorasi Kelangsungan Hidup dan Efektivitas Pendekatan Slate Segar Dalam Kerangka Kerja Insolvensi India Yang Sedang Berkembang

### Abstrak

Ekonomi negara tetap sehat dan progresif karena fungsi yang tepat dari perjanjian bisnis, transaksi, dan pemukiman komersial dan lainnya. Namun, jika kesepakatan tersebut tidak disepakati dengan cara yang diinginkan dan mengakibatkan kegagalan, upaya diperlukan untuk menjaga perusahaan berjalan dengan pengaturan baru tanggung jawab dan pekerjaan dan negosiasi ulang antara para pembiayaan. Namun, jika kelangsungan hidup menjadi tidak mungkin, perusahaan yang tenggelam dapat menggunakan pembubaran. Lembaga legislatif dan pengadilan telah berusaha untuk mematuhi dan memenuhi tujuan IBC. Mengadopsi doktrin slate baru dalam kerangka hukum adalah salah satu langkah menuju mencapai tujuan kode. Kode telah memfasilitasi pemohon resolusi dengan berbagai cara dan menyeimbangkan kekhawatiran debitur perusahaan. Peneliti telah menganalisis prinsip ini secara analitis karena pentingnya. Pada tahap awal, penelitian itu menyorozi doktrin baru, sambil merujuk pada ketentuan legislatif yang relevan dan yurisdiksi lainnya. Setelah itu, peneliti mengeksplorasi pengakuan dan pengembangan doktrin oleh sayap pengadilan. Pada dasarnya, peneliti memeriksa status dan manajemen klaim yang dipertanyakan. Dalam segmen terakhir, peneliti menunjukkan keterbatasan dan masalah praktis yang terkait dengan doktrin. Akhirnya, peneliti akan membuat beberapa saran yang dapat diadopsi dan dapat membantu dalam memperkuat rezim insolvensi India.

**Kata Kunci:** IBC; Pendekatan Slate Segar; Pernyataan Pengadilan; Pembatasan

## Исследование Жизнеспособности И Эффективности Подхода Свежего Сланца В Развивающихся Рамках Банкротства Индии

### Абстрактное

Экономика страны остается здоровой и прогрессивной благодаря правильному функционированию коммерческих и других деловых соглашений, сделок и расчетов. Однако, если такие соглашения не заключаются в желательном порядке и приводят к неудаче, необходимо прилагать усилия для того, чтобы корпорация продолжала работу с новыми договоренностями об ответственности и трудоустройстве и переговорным процессом между финансистами. Тем не менее, если выживание становится невыполнимым, то тонущая компания может прибегнуть к ликвидации. Законодательная власть и судебная власть прилагают усилия для выполнения и достижения целей МКБ. Одно из таких шагов на пути достижения цели Кодекса является принятие новой доктрины "слот". Кодекс облегчил ходатайство о урегулировании различными средствами и сбалансировал озабоченность корпоративного должника. Исследователь аналитически проанализировал этот принцип ввиду его значимости. На начальном этапе исследования проливают свет на доктрину свежести, ссылаясь на соответствующие законодательные положения и другие юрисдикции. После этого исследователь исследует признание и развитие доктрины судебным крылом. В основном, исследователь изучает статус и управление оспариваемыми претензиями. В последнем разделе исследователь указывает на ограничения и практические вопросы, связанные с доктриной. Наконец, исследователь сделает некоторые предложения, которые могут быть приняты и могут помочь в укреплении индийского режима несостоятельности.

**Ключевые Слова:** IBC; Fresh Slate Approach; Судебные Решения; Ограничения

## A. INTRODUCTION

A nation's economy remains healthy and progressive because of the proper functioning of commercial and other business arrangements, transactions, and settlements. However, suppose such agreements are not concluded in the desired manner and result in failure. In that case, efforts are required to keep the corporation going with novel arrangements of liability and employment and re-negotiation between financiers. ([The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design, 2015](#)) Nevertheless, the drowning company can resort to liquidation if survival becomes unworkable. The prime object of enacting the code is two-fold: *first*, maximization of wealth, and *second*, to keep the company as a going concern. ([Sen & Mukherjee, 2020](#)) The legislature and the judiciary have endeavoured to comply with and meet the stated objectives of IBC. Adopting the new slate doctrine in the legal framework is one such step towards reaching the goal of the code. The code has facilitated the applicant's resolution and balanced the corporate debtor's concern. ([Totla & Maheshwari, 2020](#))

The fresh slate approach can work as a catalyst in moving toward resolution rather than resorting to liquidation ([Kaviyanathan D. O, 2020](#)). It is a facilitating means to lure the resolution applicants and widen the scope of the resolution. The code further intends to safeguard the benefits of small investors. Applying the doctrine is very close to the code's intention in providing a substantive opportunity to the applicants interested in investing in the revival of the corporation ([Anand, 2020](#)). The principle in its substratum has attempted to attach itself to the resolution to meet the debt resolution from all corners ([Makuny, 2020](#)). The insolvency law facilitates corporates and individuals with a resolution framework; the debtor and the creditor can trigger the process ([Insolvency Code, 2020](#)). The significance lies in the revival of the corporate debtor and in giving the applicant a fair chance to begin the business with a fresh start. The resolution applicant should not be put in peril and should be given a reasonable opportunity without burdening him with past liabilities, which he would intend to incur ([Mehra, 2020](#)). The adoption and enforcement of the doctrine is not an easy task. Many complexities are encountered in this process as there are no precedented situations in this aspect.

The researcher has analytically analyzed this principle owing to its significance. In the initial phase, the research shed light on the doctrine of fresh slate while referring to relevant legislative provisions and other jurisdictions. After that, the researcher traverses the recognition and development of the principle by the judicial wing. Principally, the researcher examines the status

and management of disputed claims. In the latter segment, the researcher indicates the limitations and practical issues attached to the doctrine. Lastly, the researcher would place some suggestions that can be adopted and may aid in holding the Indian Insolvency regime.

## **B. METHODS**

The study aims to explore the potential and effectiveness of the "Fresh Slate" approach within the growing bankruptcy framework in India. This study chose a qualitative method with a literary and textual approach due to the complexity of legal and financial issues involving corporate bankruptcy. This research adopted a qualitative process because its focus was on an in-depth understanding of the legal, social, and economic implications of the "Fresh Slate" approach. Through interviews, observations, and content analysis, researchers can explain the differences in views, attitudes, and judgments of experts, practitioners, and stakeholders regarding sustainability and the relevance of this method in the context of bankruptcy in India.

The literary approach involves an in-depth study of related literature, including research papers, journal articles, legal documents, and policy reports related to bankroll law in India and implementing the "Fresh Slate" approach in other countries. It allows researchers to understand the evolution, pros and cons, and the results of implementing similar methods outside India. Currently, the textual approach involves analysing relevant documents and legal texts, including laws, regulations, and court rulings related to bankruptcy law in India. The researchers will examine the details of implementing existing law and identify how the "Fresh Slate" approach can be integrated or contradicted with the existing legal framework. Data obtained from literature studies and text analysis will be processed and analyzed qualitatively. This involves identifying patterns, comparisons, and in-depth interpretations of the viability and effectiveness of the "Fresh Slate" approach in the context of India's bankruptcy. This analysis will help identify challenges, opportunities, and policy recommendations for implementing this method.

## **C. RESULTS AND DISCUSSION**

### **1. Insight into a Doctrine of a Fresh Slate of IBC**

Employing the new slate doctrine is analogous to giving a second life to the corporate debtor by permitting the debtor to begin its corporate affairs

without burdened shoulders of existing claims ([Makuny, 2020](#)). This vital doctrine has never been able to be explained exhaustively and explicitly under the Indian Insolvency legal framework ([Aggarwal, 2020](#)). However, essentially, the principle implies that after the resolution process is completed, the resultant selected Resolution Applicant would be bestowed with authority to manage the affairs of the insolvent entity to resuscitate it, with a "fresh slate," i.e., detached from existing claims and liability ([Bajaj, 2020](#)). The fresh slate approach can be witnessed when the Committee of Creditors (COC) agrees on the resolution plan. The calculation of unpaid dues is done by the Resolution Professional (RP); the Adjudicating Authority would declare the current rights to be satisfied and allow the debtor to move ahead with the revival of the company with a clean slate. In this milieu, the report of the Insolvency and Bankruptcy Board of India (BLRC Report) mentioned that the present doctrine applies only to the extent of the insolvent person and not to the bankrupt entity as a whole ([Kumar & Aggarwal, 2020](#)). This interpretation of the board was based on saying that "*individuals cannot be liquidated, only firms can,*" as an action on the insolvent person would be unfruitful until the clean slate approach is bought into the picture towards the latter part of the procedure.

To concretize the instant doctrine, the "Insolvency and Bankruptcy Code Amendment Bill, 2019" was floated and resulted in amending Section 31(1) by enabling the selected resolution applicant to be equipped with the booster of fresh slate doctrine to carry out its functioning efficaciously ([Viswanathan, et.al, 2019](#)). The principle can be traced in the text of the provisions of Sections 31 and 32A of the code ([Sharma & Binu, 2020](#)). The former section implies that the authority's acceptance of the resolution plan would be productive and obligatory on all stakeholders entangled with the project, such as the debtor, creditor, and other members. The applicant can begin a new business, leaving pre-existing liabilities or debts behind. After the concurrence on the plan, the "undecided claims" cannot be flung on the applicant, placing him in an uncomfortable position to pay the due amount. ([Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, 2019](#)) Ideally, the existing claims must be advanced to the RP for determination and calculation. This, in turn, aids the designated applicant to be aware of the status of shares and the amount to be discharged by payment. The latter section annihilates the debtor's liability for any indulgence in committing any offence before CIRP and safeguards the debtor's estate. Centrally, Section 32A reflects the intent and desire of the legislative souls to facilitate the applicant with a clean start in taking control of the entity. ([Karbhari & Hashmi, 2020](#))

Since time imperial, American Insolvency Laws have been advancing while enhancing their scope and extent and moving from the conventional explanation of the debtor and creditor's rights to a novel understanding ([Kumar & Aggarwal, 2020](#)). For instance, the doctrine of fresh slate has sprung from the American laws. This has also been affirmed in the case of ([Local Loan Co. v. Hunt, 1934](#)). In this milieu, the observation of the Court in ([Williams v. United States Fid. and Guar. Co.,1915](#)) is noteworthy to refer to as the need for the doctrine of fresh slate has been explicitly discussed here. In this case, the Court stated the doctrine of clean slate "*gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.*"

## 2. A Journey Towards Evolving the Fresh Slate Approach

It is evident from the above that legislature, *via* introducing provisions gratifying debtor, has unfortunately amounted to a hike of unpaid dues. It is noteworthy to mention at this juncture that the main goal of the code was to ensure the maximization of wealth and to keep the entity as a going concern ([Joshi & Raju, 2018](#)). In a famous pronouncement of ([Swiss Ribbons v. Union of India, 2019](#)), it was penned that the object of the statute of IBC endeavors to safeguard the affairs and estate of the debtor, mainly and not the management of the company. The Indian judiciary in the Satish Kumar Gupta case has recognised the "doctrine of fresh slate" to safeguard the interest of the applicant willing to revive the entity in the loss. The present doctrine has time and again been rendered not much importance. However, the Apex Court took on its shoulder this concern and attempted to materialize the fresh slate approach by rendering its verdicts.

There are dual kinds of claims- *one*, the lawsuit that started before CIRP resulted in the consequent settlement, and *two*, the suit began following CIRP. However, only till the day of insolvency ([Mittal & Jain, 2019](#)). Herein, the matter of concern is what must be done where doubtful debts exist or, after the plan's acceptance, the claims are submitted. The researcher has briefly dealt with contrasting opinions and provided the discussion in the coming lines.

## 3. Before The Essar Judgment

Pertinently, the NCLAT in *Prasad Gempex v. Star Agro Marine Exports Pvt. Ltd.,2019*, while considering Section 31 of IBC, held that before the resolution

plan's acceptance, if any undecided or upcoming suit exists in counter to the debtor, then such proceedings shall be put away in *M/s. Kotak Mahindra Prime Ltd. v. Mr Bijay Murmura, 2019*, it was clarified that once the resolution plan has been approved and claims decided, then at a later stage, the creditors cannot take the initiative of bringing such claims again before the bench to re-determine them. If permitted, it would violate Section 31, which explicitly specifies that once concerned authorities accept the plan, it is binding on every member associated with the project. However, the question arises: what treatment should be accorded to claims raised after the plan's approval, i.e., "disputed claim"? Can a similar consideration be sorted to such claims in the light of a fresh slate approach?

The respondent engaged in *M/s Tata Steel Bsl Ltd. resolution procedure vs. Varsha W/O Ajay Maheshwari*. However, its unmet claims captivated the respondent to return those claims for recovery. Herein, the Court did not permit such an arrangement. Still, this ruling stands contrary to the *Essar Steel verdict (Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, 2019)*, which has also revoked the abovementioned judgments. Nevertheless, such denial to the creditor stalling him from recovering the due amount is resistant to the object of the IBC.

#### **4. Essar Steel Pronouncement: Crystalizing The Doctrine**

On determining when a claim can be effaced, the notable observation of the Supreme Court in the *Essar Steel* case is relevant to be discussed at this point. This verdict vitally rendered that claims countering to the corporate debtor that is not decided even after the plan's acceptance would be effaced, allowing the applicant to walk ahead freely with a clean slate. On the plan's approval, the applicant is entrusted with the kingdom of the debtor with cancelled pre-existing liabilities and claims. Further, the Court in the *Arcelor Mittal* case (*Arcelor Mittal India Private. Limited v. Satish Kumar Gupta, 2018*) considered the determination of claims that the creditor did not bring in the resolution process or of disputed claims. Highlighting the object with which the applicant tends to invest in the business, the Court mandated that complete information about the status of the claim countering debtor be rendered to the applicant, which would enable the applicant to keep a record of the amount to be discharged. In the instant case, the Court did not permit the claimants to opt for legal recourse, redressing their claims after the legal insolvency process. The Court noted that specific claims could be decided under Section 60 (6) of IBC.

However, this step flows against the mandate of Section 31. The present principle under IBC is doctrinaire and substantive.

## 5. The Aftermath of the Essar Judgment

Based on the *Essar Steel* judgment, the Court in *Santosh Wasantrao Walok v. Vijay Kumar V. Iyer* ([Santosh Wasantrao Walok v. Vijay Kumar V. Iyer, 2020](#)) precisely held that once the resolution plan is accepted, any subsequent claim has not been filed or declared unsustainable by RP would all efface. Additionally, the Court discarded the tax administrator's claim in the *Ultra Tech Nathdwara Cement Ltd. v. Union of India* ([Ultra Tech Nathdwara Cement Ltd. v Union of India, 2019](#)). It declared that existing claims and liabilities would be banished on the acceptance of the plan. The Court opined that the applicant should not be placed in an inconvenient position with burdened dues of a prior slot; instead, it should aid in providing a fresh start. Pointing out the very objective of the code, the revival of the company, the Court clarified that through this, the debtor would have a fresh beginning per the doctrine. However, the Court, in the case of *Electrosteel Steels Ltd. v. The State of Jharkhand* ([Electrosteel Steels Ltd. v. The State of Jharkhand 2020](#)), while displaying its disagreement, turned the verdict of the *Ultra Tech* case on the employment of the instant doctrine, especially in matters of taxation comprising tax debts.

This repugnancy of rulings caused aberration in the ambit of the principle of a clean slate. The Jharkhand High Court interpreted Section 31 to imply that parties associated with the resolution process are only obliged to the resolution plan once the plan is approved, not all stakeholders. Conversely, the *Ultra Tech* case Court held that even if creditors or the government do not take part in the process of accepting the plan, it shall be obligatory for all. This take of the latter case of the Rajasthan court is also affirmed by the *Swiss Ribbon* case ([Swiss Ribbons Pvt. Ltd. V. Union of India, 2019](#)), which also construed the provision of Section 31 similarly. Thus, the Jharkhand court did not construe the provision properly and was wrong in exempting the GST authority as they were equally responsible for the plan, disregarding their association in the resolution process.

The fresh slate approach in *toto* adheres to the principles of the IBC, which the judiciary in the *Swiss Ribbon* case has also confirmed. The intention behind introducing this doctrine was to ensure the reintroduction of the debtor. The principal also assures the resolution applicant that they will not be burdened with past liabilities. The flavour of equity can be smelled from this



doctrine, and it is for this conducive nature that the courts have constantly applied this approach in the insolvency process. Despite possessing such positive aspects, it also carries some limitations, which are discussed in the next segment.

## 6. Impediment in Employing The Approach of Fresh Slate

When many countries are adopting the clean slate approach and the doctrine competes with other alternative methods, it is also to be seen what kind of effects or limitations the principle application imposes. The case of Ultra Tech cited Essar Judgment as the authority for establishing the Clean Slate Approach. But the controversy is that the Essar Judgment is premised on a wrong presumption concerning claims as it is to be determined by the RP. It is correct that the RP is endowed with administrative work regarding allegations. Still, in doing so, the Court missed recognizing that NCLT can also decide on claims under Section 60(5). ([Singh, et.al. 2020](#))

There may be instances when RP would not justify or adequately deal with the claims, and NCLT can be the best authority to decide on such claims. Consequently, creditors have to resort to the challenging objection of such claims by RP before the NCLT under Section 60(5). We can infer from this that in cases where the resolution plan is sanctioned before determining the admission of unaccepted claims, such claims would not be considered qua the debtor, and remedy will be lost in this principle. Other than this, specific claims require a proper procedure for acceptance of claims. However, the code does not facilitate the NCLT or the RP to consider claims that constitute questions of law and fact. This leaves the creditors remedied as there is no platform they can approach. It is high time that the legislature looks at these concerns and accordingly amends the existing laws. This is evident from exploring the duties of RP in the code. According to Section 25(2)(b), the RP has to safeguard the arbitral or judicial proceedings. In application cases, the same can contradict the code. ([Ramabadrnan & Jaganathan, 2020](#))

The judgment in [the Indian Renewable Energy Development Agency Ltd. v. T.S.N. Raja, 2019](#), regarding the creditor's inherent right, allowing him to reach the RP to decide on his urges. The same is to be informed to the Resolution Applicant. The Company Tribunals do not just create this undecided and perplexed area of law and invoke High Courts' supervisory jurisdiction.

## D. CONCLUSION

Keeping the company as a going concern is the principal endeavour of the resolution process under the Indian Insolvency laws. This pivotal object can be accomplished by aberrance of the approach of a fresh slate, which eases and escalates the chances of revival of the entity. The doctrine's conducive nature has been legislatively and judicially recognized and expanded. Unloading the bag of pre-existing claims and liability after the plan's approval and offering the same to the resolution applicant has been perceived as beneficial and acceptable. The binding nature of the program is also kept intact in applying this doctrine, as its nullification would have an unfavourable effect. This approach also aligns with the transnational standards that the UNCITRAL Legislative Guide on Insolvency Law has recognized. Concerning unresolved claims, if a new provision is inserted, it would assist in meeting the demands of future claims. This, in turn, will boost the application and implementation of the doctrine. The principle is on the same lines as the objective of the code. The doctrine can be adapted with specific improvements and alterations in the legal framework.

## Suggestion

The researcher is of the view that with the adoption of specific measures, the problems can be mitigated. Following practices can be a step in resolving the complexities which arise on the application of the Fresh Slate Doctrine:-

- There is a need to create a proper information channel through which the statutory authority can receive an intimation about CIRP. There are many instances where the stakeholders could not get information about CIRP, and it further invokes litigation possibilities.
- The pending tax amount must be reflected in the accounts. The wording of Section 14 does not expressly states whether it includes proceedings only for adjudication.
- It is also necessary to conduct a pre-assessment by the authorities to establish their claim.
- RP should consider pending indirect taxes as part of the accounts books of the debtor; the same should be mentioned in the Information Memorandum too.

- The RP should ask the debtor and related persons about the pending appeals or revisions and decide on filing any such case.
- The attempt should be to deal with any indirect taxes that can lead to future litigation and not put any taxation hurdle on the resolution applicant.

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